The Myths and Traps of Copyright Law

by
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A. Copyright Basics.

Article II of the U.S. Constitution gives Congress the explicit power "To promote the progress of science…by securing for limited times to authors…the exclusive right to their…writings…." Copyright laws are codified in Title 17 of the United States Code. Any work which embodies originality in the *expression* of ideas or information is legally protectable if it is "fixed" in a "tangible medium of expression."[1] Copyright may apply to 1) literary works, 2) musical works, 3) dramatic works, 4) pantomimes and choreographic works, 5) pictorial, graphic or sculptural works, 6) motion pictures and other audiovisual works, 7) sound recordings, and 8) architectural works.

For works originally created on or after January 01, 1978, the duration of copyright protection for an individual is the life of the author + 70 years; for an entity, it's the shorter of 95 years from the date of publication or 120 years from the date of creation. (As for public domain, works published in or before 1922, works published between 1923 and 1989 without a copyright mark (" © ") (with few exceptions), works published between 1923 and 1964 if the renewal terms were not exercised, and works authored by federal government employees are all in the public domain. Unpublished works created before 1978 are in the public domain [as of Dec. 31, 2002].)

Federal District Courts have exclusive jurisdiction for all civil copyright infringement actions arising under copyright law.[2] Remedies under federal law include monetary damages, statutory damages and injunctive relief.[3] Monetary damages are based on either profits from the infringement or plaintiff's losses, but not both. Statutory damages by one unintentional infringer of one work are $750.00 to $30,000.00; damages from

[1] 17 U.S.C. § 102(a) lists 8 broad, non-exhaustive categories of works subject to copyright protection.
[2] 28 U.S.C. § 1338.
[3] 17 U.S.C. §501, *et seq.*

intentional infringement of multiple works are up to $150,000.00 per work. Additional remedies may include forfeiture or destruction of the counterfeiting items, court costs, attorney's fees if the copyright had been registered, sanctions as well as criminal prosecutions.[4]

B. Copyright: Sometimes More, and Sometimes Less Than Often Believed.

While, as mentioned, copyright extends to the original *expression* of ideas and information, there is no copyright protection for the underlying ideas or pieces of information themselves. In this sense, copyright law provides less protection than many believe. Items that are not subject to the protection of U.S. copyright law include ideas, data, procedures, processes, systems, methods of operation, concepts, principles, natural laws or discoveries.[5] The mere listing of individuals or businesses and respective telephone numbers in a telephone directory, for example, is "mere information" which is devoid of original expression and outside the reach of copyright protection.[6] The same is true of a mathematical theorem, or the representation of a chemical formula, even if set out in a copyrighted textbook.[7]

A first area in which copyright law provides *more* protection than often believed has to do with when the copyright begins. Copyright protection automatically starts from the time the work is fixed in a tangible or material form.[8] As will be discussed below in more detail, the basic copyright is in no way dependent on the filing of any document with the government, or the use of any particular notice.[9]

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[4] *Id.*
[5] *See* 17 U.S.C. § 102(b).
[6] *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991)
[7] It should be noted that U.S patent and trademark law may provide protection to some subject matter that is excluded from copyright protection (See, respectively, 35 U.S.C. §101, *et seq.* and 15 U.S.C. §101, *et seq.*).
[8] 17 U.S.C. § 401
[9] Although copyright notice is no longer required under U.S. law, it is nonetheless recommended because it informs the public that the work is copyright protected, it identifies the copyright owner and it indicates the year of first publication, and, under certain circumstances, deprives certain infringement defendants of any claim of innocent infringement (*See* 17 U.S.C. § 401).

The list of actions which may constitute copyright infringement also is more expansive than many assume. Section 106 of the 1976 Copyright Act gives the copyright owner (or holder) the exclusive right to do, or authorize others to do quite a few more things than many believe. These areas of exclusivity for a copyright owner include: 1) to reproduce or make copies of the work, 2) to prepare derivative works and compilations, 3) to distribute by sale or other ownership transfer, or by rental, lease or lending, 4) a qualified right of public performance, 5) qualified right to display the work, and 6) to perform sound recordings publicly via digital audio transmission.[10]

The exclusive rights of copyright extend far beyond those assumed by most people who are unfamiliar with copyright law basics, and therein lay traps for the unwary. As example of copyright infringement that might not occur to many as such would be the showing of a rented movie to one's entire neighborhood on an outdoor screen and projector (such as at a "block party"). Most everyone knows that outright duplication of a rented movie amounts to copyright infringement, while watching the recorded movie at home, in private, is perfectly acceptable. However, many might fail to recognize that the neighborhood performance of the very same movie would likely infringe the copyright in the motion picture as it applies to public performance or display.

Another common example of an assumed (but nonexistent) way around the copyright of another is by mythical "percent change rule." As mentioned, copyright law not only affords its owner the exclusive right to make verbatim copies of a protected work, but also to make derivative works thereof. Many believe that, if a copyrighted work is changed to some degree (usually stated in terms of a percentage of change), then there is no copyright infringement. This is completely false! The very fact that one has changed or adapted an existing work would, almost by necessity, mean that one has both reproduced it (to arrive at the starting point of the adaptation or change) and has, by changing it, created a derivative work.

[10] *See* 17 U.S.C. § 106.

C. Copyright Ownership: "Before You Pay, Be Sure That You Really Will Get That Bridge", and Other Lessons.

Copyright ownership is a topic relating to another fertile ground for unexpected and unfortunate surprises. One trap for the copyright novice comes in the form of "works-for-hire", or rather works which are *not* works-for-hire, but are assume to be such. A pervasive myth surrounding copyright law is that, if one pays for the creation of a copyrighted work, or if one pays for the "original" of a copyrighted work, ownership of the copyright goes to the paying party. Without more, merely paying for a copyrighted work, or for its creation in no way transfers the copyright in the work from its creator to the paying party.

An individual or business entity can come to own copyrights in only a limited number of ways. An individual who creates a copyrightable work and fixes it in tangible form will own the copyright in that work[11], unless he or she created the work other than in the course and scope of employment for another[12], contractually assigned or agreed to assign the copyright to another (in writing)[13], or created, by commission, one of several limited number of items which may be deemed "works-for-hire" in writing[14] (such categories will be described below).

Generally, a business entity will only own the copyright in a work which: (1) is created by its employee in the course and scope of the employee's ordinary work duties (this is one of two forms of a true "work-for-hire"); or (2) is assigned to it through a written assignment.

A person or business entity will own the copyright in a commissioned work, so long as that work is expressly agreed (in writing) to be a "work-for-hire" *and* is a work that is specially ordered or commissioned for use: (1) as a contribution to a collective work, (2)

[11] 17 U.S.C. § 201(a)
[12] 17 U.S.C. § 201(b)
[13] 17 U.S.C. § 204
[14] 17 U.S.C. § 101

as a part of a motion picture or other audiovisual work (3) as a translation, as a supplementary work, (4) as a compilation, (5) as an instructional text, (6) as a test, (7) as answer material for a test, or (9) as an atlas.[15] Finally, one can inherit a copyright, just as any other kind of property, and copyrights can be seized if pledged as collateral or in satisfaction of judgments.[16]

A description of the ways in which one can own a copyright is as important for that which it does *not* include, as for what it does include. A most dangerous, and often costly myth in the copyright realm provides that paying another to create a copyrightable work, without more, vests copyright in the paying party.

The unfortunate clash of myth and reality often comes in the context of specially commissioned software. As is often the case, a business will hire an outside contractor (not a true employee) to create special software, often at considerable expense. Because the software creator is not a true employee of the hiring business, and because software is not on the list of items which can be designated as a "work-for-hire", unless the software creator signs an agreement which conveys the copyright to the hiring business, the copyright in the software remains with the creator, regardless of the amount paid for its creation. Upon completion of the software project, the paying business, under these circumstances, often assumes that it "owns" the software in all respects, but such is not the case. The unpleasant reality often becomes apparent when business management decides to have a different software designer create a newer version or upgrade (a derivative work), or decides to sell or license the software to a third party. It is then that the business may learn that, without a prior written assignment of the copyright, and regardless of how much was paid for the software development, the business possesses merely the right to *use* the software, *not* the right to change it, sell it, license it to others, or do most anything else outside of the originally anticipated nature of use(s) of the software.

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[15] *Id.*

[16] 17 U.S.C. § 201(d)(1)

Another instructive example is that of the purchase of an original work of art. Assume, for example, that a person purchases, at considerable expense, the "original" of a piece of art. Regardless of the price paid, without a written assignment of the copyright from the artist, or from someone who acquired the copyright from the artist, the purchaser merely holds the right to possess the one, physical manifestation of the copyrighted work.[17] Perhaps to the purchasers surprise and consternation, he or she does not have the right to make copies, to put on public exposition, to create any derivatives works, etc.

D. Copyright Fair Use: "But I Copied It For Use In My Class!"

Yet another trap for the unwary relates to "fair use" of a copyrighted work. It is true that the rights afforded by copyright are not absolute, nor unlimited in scope. Sections 107 through 121 of the 1976 Copyright Act provide specific exemptions from copyright liability, or limit the reach of copyright exclusivity.

Simply stated: "fair use" of a copyrighted work is that which, though within the scope of activities explicitly proscribed under Section 106 of the Copyright Act, is permitted, without consent of the copyright owner, if the use of the copyrighted material is in a reasonable and limited manner, and, on balance, sufficiently meets certain statutory criteria.[18] Examples of fair use: when the copyrighted work is used in a review, criticism, or parody; short quote or small reproduction for scholarly (non-profit) work or by a teacher or student; summary for a news report or publication; reproduction by a library or for legislative or judicial proceedings; incidental, ancillary or fortuitous reproductions.

It is very important to realize that the Fair Use Doctrine does not reach nearly so many instances of copyright exploitation as many would like to believe, and there is no simple test to determine when it applies.[19] Many assume, for example, that, if copying is

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[17] 17 U.S.C. § 202

[18] For a case in which these factors are applied, *see Hustler Magazine, Inc. v Moral Majority, Inc.*, 606 F.Supp 1526 (C.D. Cal.), aff'd 796 F2d 1148 (9th Cir. 1985).

[19] In *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the Supreme Court confirmed that the task of evaluating fair use cases "is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." Id. at 1170, citing *Harper & Row v. Nation Enterprises*, 471

done for “educational purposes”, this alone insulates the copier from copyright infringement liability. Fair use protection relating to education (or otherwise) is not nearly so broad as many would believe. Assume, for example, that a teacher, perhaps under pressure from a school to save money, copies text book excerpts or student worksheets for his or her class. Particularly because the copyright owner’s sole commercial exploitation opportunity of the work is in selling copies to schools, there is little chance that such copying will be found to be fair use, and both the teacher and the school could find themselves “in hot water.” Buying a single professional journal, and making copies for multiple employees of a business is another practice which is often assumed to be fair use. A number of companies have learned the hard way that such a practice rarely amounts to fair use, and can yield substantial copyright infringement liabilities.[20]

E. Copyright Registration: Optional, But Not Really.

Finally, the issue of copyright registration represents an area of confusion and frequent mistakes. It is no longer required, as it once was, to register a copyright, for the copyright to survive after publication of a work.[21] So far as it goes, therefore, it is true, as many report, that copyright registration is no longer required in the United States. However, if a copyright owner publishes their work and fails to register the work before the latter of three months from publication, or before an act of infringement for which they wish to sue, the copyright owner will be deprived of any right in an infringement action to receive “statutory damages” (automatic damages which do not require strict proof of injury), as well as attorneys fees.[22] Therefore, failing to register one’s copyright may well render an otherwise economically viable copyright infringement suit into one which simply cannot be justified from an economics standpoint.

F. Conclusion.

U.S. 539(1985) and *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 104 S.Ct 774 (1984), "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Acuff-Rose*, 114 S.Ct. at 1170-1171.

[20] American *Geophysical Union et al. vs. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

[21] 17 U.S.C. § 408

[22] 17 U.S.C. § 412

In summary, a copyright applies to more things, provides more rights, is easier to infringe, and/or is harder to own than most people believe. In view of the severity of penalties for copyright infringement, it is important debunk as many copyright law myths as possible.

ABOUT THE AUTHOR (see also: **www.PilotAtLaw.com**) :

David G. Henry is a registered patent attorney in both the United States and Canada, and carries on his private law practice as a Partner of the law firm of Patton Boggs LLP, based on Washington, D.C. (www.**PattonBoggs.com**). Mr. Henry maintains his primary office in the firm's Dallas, Texas offices. On the academic side of his professional work, Mr. Henry has, since 1994, served as professor for patent and trademark law courses at Baylor Law School.

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Mr. Henry is a Lieutenant Colonel in the United States Air Force's Auxiliary where his unit flies humanitarian, search and rescue and disaster relief missions under auspices of the U.S. Air Force and a variety of federal and state emergency services agencies. Mr. Henry also channels his passion for aviation into his private practice as he flies, nation-wide, to meet clients and manage his various patent and trademark projects and cases. It is, in part, because of his well-known stance that "geography is never an issue when working with me", that Mr. Henry's practice extends throughout the United States (and beyond).